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THE PRACTICE OF JUSTICE

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The Tyrrell Williams Memorial Lectureship was established in the School of Law of Washington University by alumni of the school in 1949, to honor the memory of a well-loved alumnus and faculty member whose connection with and service to the school extended over the period 1898-1947. This eighteenth annual lecture was delivered March 9, 1966.

Thirty-five years ago, I studied Contracts at the feet of the great teacher whose memory honors this series of annual lectures. I could not now recite a single rule I learned from Tyrrell Williams or state the facts of any case we covered in his course. What I retain from Professor Williams' teaching is something incomparably more important, his insistence that the administration of law is not a closed system but a social process and that legal reasoning requires not only powers of abstraction and logical inference but also continuing acts of imaginative perception and ethical judgment. Best of all I remember a morning in the fall of 1931 when I began to put away childish things and understand what law in life is all about.

Professor Williams began his Contracts class that day by expounding one of his wonderful hypothetical cases and inviting volunteers. Angels would have feared to tread there, but I rushed in with a confident and categorical answer. Professor Williams looked over his glasses quizzically, shook his head to brush me off, and called on someone else. Strong in the valor of ignorance I took up the argument with him after class. To be sure, his analysis of the problem case had made it plain that the result for which I was contending would be unfair as between the parties to the supposed controversy. But what of that? I was relying on an impeccable general proposition of law, and the syllogism in which my argument moved from major premise to conclusion was steady and remorseless, or so it seemed to me. "And so, sir," I concluded, "isn't that the way your case would have to go?"

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Tyrrell Williams was kind, but his vast kindness was tempered with intellectual toughness as every great teacher's must be. "You are losing sight of the merits of the case," he said. "That decision would be terribly unjust on the facts I gave you. You know—or ought to by now—that no decent judge would reach that result in my case."

"But, sir," I persisted, "that is how he would have to decide it, whether he wanted to or not."

"*Have to,* my eye!" replied my master. "It isn't very often that a judge has to decide a case unjustly. He'd find a way to decide it right—and so would you if you could get it through your head this is a *case,* not an exercise in algebra."

This was the greatest of the countless lessons I learned from Tyrrell Williams during the three years I was his student and the three additional years, here at Washington University, when I was his colleague on the law faculty but his student still. It is appropriate, I think, that I make this crucial lesson the subject of our 1966 Tyrrell Williams Lecture. Individual case "merits" are fully as influential as general legal rules as factors in how cases actually get decided. It is only rarely in our legal order that the justness of a claim is not the strongest argument that can be made in support of its recognition. Jurisprudential theory is remote from the reality of law in action unless it takes full and sufficient account of this element of individual justice in the administration of law. The practicing lawyer who ignores this fact of legal life does so at his peril.

I. The Binocular Vision of Justice

"A *case,* not an exercise in algebra!" Professor Williams' crisp reminder of the primacy of the case for the practice of justice came back to me many years later at a university seminar on the professions, when I heard a great internist[1] describe the practice of his profession. There are, he said, two equally important elements in medical practice, the science of medicine and the art of healing. The art without the science is at best benevolent quackery, the science without the art cold and limited in therapeutic effectiveness. The great physician is master of them both, learned in the science of his profession and, at the same time, possessed of a sympathetic vision that sees the patient before him not just as a more or less standard example

1. Dr. Dana W. Atchley, Professor Emeritus of Clinical Medicine, College of Physicians and Surgeons, Columbia University. The University Seminar on the Professions, which met at Columbia from 1950 to 1953 under the chairmanship of the distinguished sociologist, Robert K. Merton, was supported by a grant from the Russell Sage Foundation. The Seminar was composed of members representing eight professions: medicine, law, architecture, engineering, social work, the ministry, nursing, and education.

of encephalitis or Parkinsonism but as a unique and complex individual, a whole man of personal dignity and inalienable singularity.

Similarly, I suggest, there are two equally important elements in the administration of justice, the science of law—for legal precepts and legal reasoning have at least some of the attributes of a science—and what I will call the art of the lawyer. Every case that comes to a court for decision—or to a lawyer's office for counseling or advocacy—is, on the scientific view of things, an item for conceptual analysis and classification. *Doe v. Roe* is, we say, an equal protection case or a third party beneficiary case or a constructive trust case, and this classification brings the applicable rules and precedents into play for analysis, argument, and judicial explanation. But *Doe v. Roe* is more than a specimen for classification; it has its further reality as a concrete dispute between living claimants and calls for a fair and just disposition between them.

Which is the ultimate reality, the general rule or the concrete case? To ask this is to enter a battleground over which philosophers have fought for many centuries. Are we to associate ourselves with the philosophical "realists" and so locate ultimate legal reality in the area of the universal, the general legal proposition or concept? Or are we to join forces with the philosophical "nominalists" and assert that only concrete cases are real and general legal concepts but names devised for convenient groupings of singular reality? In law, no such hard choice is forced on us. Realism and nominalism are two ways of seeing, and our adjudicative tradition makes use of them both.

Consider, as our analogy, the following passage from Ernst Cassirer's *Essay on Man:*

> In science we try to trace phenomena back to their first causes, and to general laws and principles. In art we are absorbed in their immediate appearance, and we enjoy this appearance to the fullest extent in all its richness and variety. . . . The two views of truth are in contrast with one another, but not in conflict or contradiction. . . . The psychology of sense perception has taught us that without the use of both eyes, without a binocular vision, there would be no awareness of the third dimension of space. The depth of human experience in the same sense depends on the fact that we are able to vary our modes of seeing, that we can alternate our views of reality.[2]

This is the heart of what I have to say in this Tyrrell Williams Lecture. Legal reality has a twofold aspect. There is a "science" of law in which every case is, in truth, an illustration of a general rule. There is an "art" of law in which the focus of perception is on the individual case, in all its

2. CASSIRER, AN ESSAY ON MAN 169-70 (Yale ed. 1962).

immediacy and singularity. "The particular in isolation," Felix Frankfurter once wrote, "is meaningless; the generalization without concreteness, sterile."[3] Without binocular vision, without the use of both eyes, there can be no true understanding of the problem of justice as it exists in law in life.

Here, I suggest, is the middle ground between a jurisprudence of conceptions, in which legal rules are primary and particular cases seen as generalization fodder, and an equally unacceptable legal nominalism which looks only to "fireside equities"[4] and dismisses legal rules as mere grounds for rationalization of decisions reached *ad hoc*. Conceptualist and nominalist theories of the decisional process are equally misdescriptive of the practice of justice as it goes on from day to day in the real world of courts, law enforcement agencies, and law offices. Each, the conceptualist and the nominalist, has hold of a part of the truth, but each asserts a profoundly false *either/or* relation between the demand of the general legal principle and the appeal of the concrete situation embodied in a particular controversy. For it is not *either/or* in the practice of justice. A legal order like ours is at once mindful of the values of consistency and predictability in the application of principles and sensitive to the variety, the intractable singularity, of the controversies that arise between men in society.

My emphasis, in the next part of this discussion, will be on the many ways in which the legal order, as it exists, manifests its sensitivity and responsiveness to the individual merits of particular cases. Do not infer from this emphasis that I am subscribing to the full nominalist thesis and forgetting the "law as rule" side of the binocular vision of justice. If I were forced, as I am not, to choose between the schools and become either a card-carrying nominalist or a card-carrying conceptualist, I would, I suppose, say that the nominalists are rather closer to legal reality, at least as it exists in trial courts and in law offices, than their rule-minded adversaries are, but that is not the explanation of my emphasis. My point is rather that the "scientific" view—rules as primary and cases as incidental and secondary—is vastly over-represented in the literature of jurisprudence and legal scholarship, and I hope to contribute towards some restoration of the balance by emphasizing, perhaps over-emphasizing, the aspect of case-mindedness and individualization in the practice of justice. A little skeptical

3. FRANKFURTER, *Mr. Justice Holmes and the Constitution*, 41 HARV. L. REV. 121, 157 (1929).

4. The late Karl N. Llewellyn drew a sharp distinction between "the relevant problem-situation *as a type*" and the "fireside equities" or "other possibly unique attributes of the case in hand." LLEWELLYN, THE COMMON LAW TRADITION—DECIDING APPEALS 268 (1960). (Emphasis added.) The term "fireside equities" is used as the equivalent of "the immediate equities of the controversy." *Id.* at 443.

nominalism is good for legal analysis, and long overdue. For, and this will be one conclusion of this Lecture, the exaltation of general rule over concrete case in formal professional discourse, in discussions of law and legal institutions by scholars in other fields, and in the understanding of citizens generally, has gravely undesirable consequences for law administration and law practice, and for law itself.

II. The Ways and Means of Individualization

The "scientific" element in the practice of justice is related to the basic requirement that law's precepts be general in statement and application. Without generality in law, there would be no equality in the legal order, no impersonality or formal rationality in the operation of adjudicative institutions, no predictability in the planning of future conduct. "On the whole," wrote the late Edwin W. Patterson, "the generality of law is its most important characteristic."[5] Indeed, the idea of the legal precept as a measure, a norm, a general rule, is so deeply ingrained in our legal philosophy that most definitions of "law" list generality as an essential attribute and exclude the particular command, order or judgment.

Yet we know that there is another side to law's formal generality. To be general, a precept must be abstract, and the inclusiveness of any abstract formulation is achieved only by sacrificing something of concrete reality. We are mindful of Alfred North Whitehead's warning that "No code of verbal statement can ever exhaust the shifting background of presupposed fact,"[6] and of Justice Holmes' astringent observation that "General propositions do not decide concrete cases."[7] But the classic statement of this aspect of the problem of justice is much older and comes, curiously enough, from Aristotle, a thinker far more inclined in his general world view to universals than to singulars:

> Law is always a general statement, yet there are cases which it is not possible to cover in a general statement. In matters therefore, while it is necessary to speak in general terms, it is not possible to do so correctly, the law takes into consideration the majority of cases, although it is not unaware of the error this involves. And this does not make it a

5. Patterson, Jurisprudence—Men and Ideas of the Law 97 (1953).

6. Whitehead, Adventures of Ideas 71 (Mentor ed. 1933).

7. Lochner v. New York, 198 U.S. 45, 76 (1905) (dissenting opinion). Shortly before the *Lochner* decision, Holmes had written the following to his friend, Sir Frederick Pollock: "My intellectual furniture consists of an assortment of general propositions which grow fewer and more general as I grow older. I always say that the chief end of man is to frame them and that no general proposition is worth a damn." 1 Holmes-Pollock Letters 118 (Howe ed. 1941).

> wrong law; for the error is not in the law nor in the lawgiver, but in the nature of the case: the material of conduct is essentially irregular. . . . This is the essential nature of the equitable: it is a rectification of law where law is defective because of its generality.[8]

Aristotle's definition of the "equitable" is a prophetic and wonderfully apt description of the historic role of the English courts of chancery during the sixteenth and seventeenth centuries, when the common law, for a time, lost its traditional sensitivity to the merits of individual cases and became rigid and rule-bound. Equity has disappeared since then as a separate system of courts, but the idea of the equitable survives in full vitality and invigorates the common law judicial process. Consider, as a manifest example, the extent to which our law's central working policy, the doctrine of precedent, reflects this pervasive inclination to concrete and singular cases rather than to abstract and general rules. To say that a court follows the principle of *stare decisis* does not mean that it applies, in a mechanical and undiscriminating way, the general propositions of law stated in past judicial opinions. In the use of case-law precedents there is always room for necessary case-to-case individualization, always leeway for Aristotle's "rectification of law where law is defective because of its generality."

The common law doctrine of precedent is grossly misunderstood if seen only as a device for insuring certainty and generality in the application of established case-law principles. To be sure, it has that function: as a general matter, like cases are to be decided alike. But common law method is intractably case-minded, fully as sensitive to factual differences in cases as to their factual similarities. Rules stated in past judicial opinions are mere *dicta*—"persuasive" but not "controlling" as statements of legal principle—if they go beyond the material facts of the cases that were then before the court for decision. Yesterday's precedent is "binding" on the court in today's controversy only if the two cases involve the same material facts. And it is today's court, confronted with today's concrete and singular controversy, that determines what the material facts of yesterday's case were—and so whether yesterday's decision is a binding precedent for the disposition of today's controversy.

It is quite true, as exponents of one or another version of slot-machine jurisprudence enjoy pointing out, that flat overrulings are few and far between, except perhaps in the Supreme Court of the United States, where special considerations and special ground rules apply. A typical state court

8. NICOMACHEAN ETHICS, Book 5, reprinted in MORRIS, THE GREAT LEGAL PHILOSOPHERS 25 (1959). The quotation is from the Rackham translation in the Loeb Classical Library. Compare the same text, in the Ross translation, in MCKEON, INTRODUCTION TO ARISTOTLE 421 (1947).

of last resort—the Supreme Court of Missouri or the Court of Appeals of New York—will, in the course of a working year, explicitly overrule at most two or three of its established case-precedents. But to stress this is to miss the point of the common law tradition. Out-and-out overruling of precedents is rarely necessary, because, in most situations, a just and sensible decision for today's case can be reached by distinguishing any embarrassing precedents away as somehow different in material facts from the concrete case now before the court. As this selective process continues over the years —this helpful precedent extended to justify sought results in new situations, that awkward one limited or distinguished away—we are likely to see the emergence of competing lines of precedent, so that a conscientious trial judge, called on to decide a close and difficult controversy, can decide that new case either way and support his chosen decision with all conventional legal proprieties.

What I have said about the room for case-by-case individualization within the policy of *stare decisis* is not to be taken as a cynical account of the judicial process. To me, as I think to most lawyers, this flexibility and responsiveness to the particular merits of particular cases is the essential genius of the common law system. My present point is the narrower but, I think, more important one that the workings of our method of precedent exhibit dramatically the interplay of science and art, general rule and concrete case, in the practice of justice.

What does this mean for the work of counselors, advocates and judges in the world of law in action? All the implications could not be exhausted in a lecture ten times longer than this one, but a few should suffice for our present purposes. If the counselor is to make an accurate prediction of "what the courts will do in fact"[9] in a given problem situation, he must be as sensitive to the factual singularity and intrinsic equity of the concrete case on which his professional advice is sought as he is knowledgeable about the general "state of the law" embodied in the precedents. If the advocate is to make an effective presentation of a case committed to his charge, he cannot proceed, as too many do, by offering the court a formless and unfocussed collection of past judicial statements and holdings; what matters most is not past cases but *the case he has now,* and the factual merits of that case must shine through if his argument is ever to engage the serious attention of the court.

9. "The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law." HOLMES, *The Path of the Law* in COLLECTED LEGAL PAPERS 173 (1920). *The Path of the Law,* the most influential piece of writing in the history of American jurisprudence, was originally delivered as an address to law students at Boston University and first published in 10 HARV. L. REV. 457 (1897).

To be sure, the judge presiding over any argument is doing his best to apply the law; he is bound by his judicial oath to do precisely that. But he wants, too, to reach a just result in the particular case before him. More often than not, if the judge gets proper assistance from counsel in a case, he can accomplish both of his sought objectives. There is no paradox in this; it is a consequence of our legal system's built-in responsiveness to the appeal of justice in concrete situations. In the binocular vision of justice, fidelity to general law and fairness in the disposition of particular cases are contrasting but not contradictory objectives.

Thus far I have been dealing almost exclusively with the realities of our common law method of precedent. *Stare decisis* is, after all, the distinctive policy of Anglo-American law and the one most often misunderstood by critics within and without the fraternity of legal scholarship. But I do not mean to suggest that the process of discriminating individualization is found uniquely in the use of case precedents as decisional sources. Established techniques of statutory construction in the federal and state courts reflect the same inclination to take due account of the particular facts of concrete cases, and there is as much room for responsible case-by-case individualization in the judicial application of statutes as in the decision of controversies by reference to case-law precedents.

To say this is not to affix a general endorsement to Bishop Hoadley's famous pronouncement, so often quoted by John Chipman Gray, that "Whoever hath an absolute authority to interpret any written or spoken laws, it is he who is truly the Law-giver to all intents and purposes, and not the person who first wrote or spoke them."[10] Whatever the scope of judicial discretion, the judicial process in the interpretation of statutes is not as free-wheeling as all that! But there are ways and means, accepted and legitimate ones, of case-to-case "rectification" of statutory generality. If the words of a statute, read alone, point to what a court deems the fair result in a concrete case, the court can invoke the familiar plain meaning rule and refuse to go beyond the text of the statute. If the same statute, literally applied, would lead to an unjust result on the facts of the next case, the court is likely to take another look into its bag of clubs and pull out the equally respectable principle that statutes are to be applied not literally but in accordance with the intention of the legislature. If neither of these approaches accomplishes the sensible result, there is a whole armory of devices to be drawn on: canons of strict construction, presumptions against retroactive

10. Gray uses the quotation three times in THE NATURE AND SOURCES OF THE LAW 102, 125, 172 (Beacon Press ed. 1963). Gray's views on the interpretation of statutes are sharply criticized as "atomistic" in FULLER, THE MORALITY OF LAW 84 (1964).

application, maxims like *ejusdem generis* and *expressio unius,* and many more.

Orderly minded, scholarly critics are likely to find nothing but rampant confusion and inconsistency in the decisional literature of statutory construction. They should dig deeper, because much of the inconsistency vanishes, or takes on a different appearance, if we borrow a clue from Holmes[11] and address our inquiry not to "What rule of construction was employed by the court in this case?" but to *"Why* did the court in this case use this rule of construction rather than one of the others at hand?" Try this little exercise on the next ten cases you read that involve questions of statutory construction. I warrant that you will find, in at least nine of them, that the court chose the rule of construction it did because that was the one that led to a sensible and just decision in the concrete case at hand. In statutory cases, too, accurate prediction and effective counseling depend not only on the lawyer's understanding of what the statute says but also and equally on his sensitivity to and ability to convey the intrinsic merits of the case he has now.

Law's responsiveness to the variety and case-to-case singularity of the controversies that can arise between men in society finds expression not only in our accepted techniques for the use of legal sources but also, and perhaps more obviously, in the form of the sources themselves. Outsiders, even philosophers and social scientists who should know better, tend to think of the law as a body of quite specific rules, an aggregate of precise and narrowly worded propositions like "don't start until the light turns green," "a will is invalid unless witnessed by two persons," or "a bid at an auction sale is not an offer." There are many cut-and-dried directions like these: one finds them, for example, in real property, where certainty of record is a value of top-priority importance; in criminal law, where our tradition requires that explicit warning be given to possible offenders; and in income taxation, where the administrative efficiency of a mass-production operation is a dominant consideration. In most areas of the law, however, the crucial precepts are formulated in terms of far wider connotation. As Cardozo wrote almost fifty years ago: "We are tending more and more towards an appreciation of the truth that, after all, there are few rules; there are chiefly standards and degrees."[12]

Thus in the law of contracts—a course I teach as everyone who ever took

11. "You can give any conclusion a logical form. You always can imply a condition in a contract. But why do you imply it? . . . Such matters really are battlegrounds . . . where the decision can do no more than embody the preference of a given body in a given time and place." HOLMES, *supra* note 9, at 181.

12. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 161 (1921).

Contracts from Tyrrell Williams must long to do—a right to restitution for a benefit conferred on another person exists "if as between the two persons it is unjust for the recipient to retain it,"[13] and an unbargained-for promise that has induced action by the promisee is binding on the promisor "if injustice can be avoided only by enforcement of the promise."[14] There is no tension here between the demand of general legal policy and the claim of justice in the concrete case; the legal principle itself incorporates individual justice as the governing test.

Broad standards like these are not unique to the law of contracts; indeed, contracts is a "reliance" area of law, and its precepts are probably less wide in formulation than in many other fields. The law of torts has its standard of the "reasonably prudent man," the law of trusts its sweeping concept of "fiduciary obligation," and constitutional law its standard of "due process of law" and others expressed in terms so broad that Learned Hand characterized them as "empty vessels into which [the judge] can pour nearly anything he will."[15]

The use of broadly formulated standards is not, we must note, a survival from more primitive stages of law's development but a phenomenon of law's maturity. As law becomes more sophisticated about the efficacy of detailed rules and more sensitive to the varieties of human controversy, less faith is put in narrow commands as instruments of justice and more faith in case-by-case discretion and judicial judgment. Roscoe Pound recorded this prevailing movement in legislative and judicial lawmaking in words that would be hard to improve on:

> [Standards] are general limits of permissible conduct to be applied according to the circumstances of each case. They are the chief reliance of modern law for individualization of application and are coming to be applied to conduct and conduct of enterprises over a very wide domain. . . . It may be said that in each case there is a rule (in the narrower sense) prescribing adherence to the standard and imposing consequences if the standard is not lived up to. This is true. But no definite, detailed state of facts is provided for. No definite pattern is laid down. No threat is attached to any defined situation. The significant thing is the standard, to be applied, not absolutely as in case of a rule, but in view of the facts of each case.[16]

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13. RESTATEMENT, RESTITUTION § 1 and comment *c* (1937), summarized in JONES, FARNSWORTH & YOUNG, CASES AND MATERIALS ON CONTRACTS 195 (1965).

14. RESTATEMENT, CONTRACTS § 90 (1932).

15. *Sources of Tolerance*, address by Learned Hand, June 1930, in THE SPIRIT OF LIBERTY 81 (Dilliard ed. 1952).

16. Pound, *Hierarchy of Sources and Forms in Different Systems of Law*, 7 TUL. L. REV. 475, 485 (1933).

Statutes and case-law principles expressed in standards like these do more than authorize case-by-case judgment in the decisional process. They invite and command it, and, for the counselor, the advocate and the judge, everything turns again on the singular factual merits of the concrete case at hand.

Institutions for case-by-case individualization in the handling of concrete human controversies are encountered everywhere in the practice of justice. If we were not as preoccupied as we are with the idea of law as a body of rules, explicit commands, we would see these institutions for what they are and so be able to appraise them in terms of their actual, not their formal, function. The jury system, seen in this perspective, is far less a device for the finding of facts than an agency—perhaps, to be sure, an outmoded one —for individualization in the application of law. When a jury brings in a verdict that seems against the weight of the evidence, it is an incomplete explanation to say that it has made an erroneous finding of the facts. The jurymen may have known perfectly well what the out-of-court facts were but made their decision, against their instructions and in the teeth of the facts, because of their shared conviction that the essential justice of the case was with one party rather than the other.

Decisions like these, turning on the decision-maker's impression as to the essential justice of a matter, are made every day in the enforcement of the criminal law, and it is in prosecutors' offices, rather than in courts, that most of these decisions are arrived at. Shall an accused person be charged, and, if so, with how grave a crime? Shall he be given the opportunity to plead guilty to a lesser offense, or shall he be prosecuted for the most serious crime that the evidence will support? Twenty-five years ago, I had responsibility for the direction of a massive law enforcement program,[17] and I have believed ever since that the discretion of the prosecutor is the most important single element in a state's criminal law. The Model Penal Code prepared under the leadership of my colleague, Herbert Wechsler, is a towering achievement in legal scholarship and law reform, but I rejoice equally in the growing increase of our knowledge, to which Professor Miller and Professor Gerard of this law faculty have made substantial contributions, concerning the ways in which police officials and prosecuting officers exercise their discretion and inevitable dispensing power in the individualization of criminal prosecution and punishment.[18]

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17. Director of Food Enforcement, Office of Price Administration.

18. LaFave, Arrest—The Decision to Take a Suspect into Custody (1965) is the first of a series of monographs on the administration of criminal justice in the United States being brought out by the American Bar Foundation under the general editorship of Professor Frank J. Remington. The volume on prosecution for this important series

On an occasion like this one, I could not possibly undertake a complete and encyclopedic inventory of the agencies of individualization that abound in our legal order. It must be noted, however, that the task of case-by-case individualization is performed not only by judges and other public ministers of the law but also by practicing lawyers. The lawyer's distinctive art, adaptation of law's general rules to the merits and necessities of concrete situations, is called for at every stage of the profession's work: in the drafting of wills, agreements, and other documents, in the structuring of transactions, in the arbitration of disputes, and in the negotiation and arrangement of out-of-court settlements.

Anyone with a little legal training can consult the law books and tell a client what he cannot do. The lawyer—the honest-to-God lawyer—has the imagination and intellectual resourcefulness necessary to tell his client *how* he can do, legally and fairly, the things that a concrete situation requires be done. This necessitates not only knowledge of the state of the law but also—and this is far harder—deep and perceptive understanding of what I have been calling "the case you have now." In the lawyer's office, as in the courtroom, there is need for a binocular vision that is, at once, mindful of the demands of the general rule and sensitive to the merits and necessities of the concrete situation.

III. Legal Reality: The Need for Candor

"A *case,* not an exercise in algebra!" Why have I made this the essential theme of today's lecture? One reason, and a sufficient one, is that it is something I learned from my great teacher, Tyrrell Williams. The other and closely related reason is that I consider it the most important single thing that can be said to law students, or to scholars in any field who want to have a grasp of legal reality.

We are always hearing about a supposed "gap between law school and law practice." This, I suggest, is not a matter of knowing where the clerk's office is or how to prepare an affidavit. Law graduates are brighter than they were in my day, and they catch on to workaday details with astonishing ease and speed. The true gap is that students—and here they are like scholars in any field—leave law school almost too well informed about general legal principles and insufficiently aware of law's pervasive occasions for case-by-case individualization. A few years practice of the lawyer's art corrects this imbalance in most instances, but it is a gap that many lawyers never manage to get across, to the lasting damage of their professional ca-

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is being written by Professor Frank W. Miller of the Washington University School of Law.

reers and the profound disservice of their unhappy clients.

In university legal education, it is the case method of instruction on which we rely to give our students an awareness of the continuing interplay of legal science and the lawyer's art.[19] The founder of the case method, Christopher Columbus Langdell, built better than he knew. We have abandoned Dean Langdell's notion of the case method as a "scientific" procedure, but we have retained it as the way to develop the qualities of what we like to call the "legal mind": precision in the understanding and statement of facts, distrust of easy generalizations, and capacity for original and constructive thought.

There is need for a continuing rear-guard action to maintain the integrity of the law school case method. We law teachers are too much inclined toward the use of cases not as exercises in the practice of the lawyer's art but as mere illustrations of general rules and principles. With the vast extension of government regulation and the proliferation of legal materials, we are under increasing pressures to cover more ground, offer more courses, give law students more and more legal information. Like our brothers of the judiciary and the practicing bar, we academic lawyers are unduly preoccupied with the appellate courts—where the distinctive task is that of clarifying the general law—and give insufficient attention to the trial courts, where the task of fair individual decision is central. At the risk of sounding like the Ancient Mariner, I would have us stand by the case method. It is a painfully slow way of covering substantive ground, but it is the best device I know for communicating the realities of the binocular vision of justice.

When one moves outside the universe of the law schools and the legal profession, he becomes conscious of other damage done by the undue concentration of our professional discourse on law as general rule. Social scientists are becoming more interested in legal institutions and far more willing than they used to be to work in collaboration with lawyers for better understanding and practical improvement of the legal order. But, by and large, the scholarly and pragmatic value of the work done so far in law-related fields by sociologists, economists, social psychologists, political scientists and others has been gravely reduced by their failure to apprehend the primacy of the case in the practice of justice. It is painful to see how a social scientist, wonderfully sophisticated in his own field, can adopt a slot machine theory of justice and remain oblivious to the occasions for case-to-case discretion that characterize present-day American law.

19. See Jones, *Objectives and Insights in University Legal Education,* 11 OHIO ST. L. J. 4, 5-7 (1950), Patterson, *The Case Method in American Legal Education: Its Origins and Objectives,* 4 J. LEGAL ED. 1 (1951).

But there are even more serious consequences. Widespread public misapprehensions concerning the realities of law in action have contributed almost everywhere to a serious underrating of the importance of judicial personnel and judicial selection.[20] The Missouri Plan of merit selection of judges is, I am confident, the wave of the future, but it is not state-wide even in Missouri, and it is a long way off in most jurisdictions. We will not have a sound system of judicial selection throughout the United States until informed citizens generally are made conscious of the interplay of law as science and law as art in the administration of justice.

Too many people, unaware that law has its aspect of discriminating individualization as well as its aspect of generality, conclude that it makes little difference who occupies the bench. Assuming elementary probity, they ask, will not any two judges decide a case the same way? Other laymen, a bit better informed, but not much, make the frightful assumption that a lawyer is best qualified to be a judge if he is a walking encyclopedia of legal rules and principles. I hardly need to add that everything I have just said applies equally to the selection of district attorneys and other prosecuting officials. If, as I believe, the most important thing about a jurisdiction's criminal law is who its district attorney is, it is urgent that citizens generally be made aware of the fact that prosecuting attorneys, informally, and largely on their impressions of offenses and offenders, decide the fate of far more accused persons than ever appear in the courts for trial.

But I would not rest my case entirely on pragmatic considerations. The rule of law is central to our society, and it should be known, discussed and venerated for what it is. Public awareness of the binocular vision of justice will not, as the conceptualists fear, reduce respect for legal institutions. For there is surely nothing discreditable about a legal order that pursues, at once, the goal of equality before the law and the contrasting but not, in our system, contradictory goal of justice in the individual case.

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20. Winters & Allard, *Judicial Selection and Tenure in the United States* in THE COURTS, THE PUBLIC AND THE LAW EXPLOSION 147 (Jones ed. 1965).